

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN WEBER,)
)
 Appellant,)
)
 vs.)
)
 RALPH AOKI, TRUSTEE,)
)
 Appellee.)
)
 _____)

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an Appeal from the United States Court for the District of Hawaii. The jurisdiction of the lower court was conferred by virtue of the Bankruptcy Act, Section 2A.

Also, 11 U.S.C., Section 11(a).

And, 28 U.S.C., Section 1334.

The initial proceeding was commenced in the District Court of Hawaii by the filing of a proceeding for the reorganization of Weber Trucking & Equipment Rental, Inc., under Chapter X of the Bankruptcy Act (Record 2). Thereafter an Order was entered approving the Debtor's Petition (Record 25).

However, on November 1, 1966, an Order was entered dismissing the proceeding for reorganization and adjudging Weber Trucking & Equipment Rental, Inc., a bankrupt (Record 32).

The Notice of Appeal was filed herein on January 18, 1968 (Record 79). Extensions of time were granted for the filing of the Appellant's Opening Brief.

The amount involved is over \$500.00.

Jurisdiction of this Court is conferred by the Bankruptcy Act, Section 1(3).

Also, Bankruptcy Act, Section 24(a).

And, 11 U.S.C., Section 47.

And, 11 U.S.C., Section 1(3).

STATEMENT OF THE CASE

This is an Appeal by Helen Weber, a creditor of Weber Trucking & Equipment Rental, Inc. (Record 60). Helen Weber was formerly President of the corporation (Record 6). This corporation, hereinafter referred to as "WEBER, INC.," was a small corporation. (Balance Sheet attached as Exhibit "B" to Debtor's Petition, Record 14 and Record 15) Its working capital had been depleted. One obligation in excess of \$56,000.00 was owed to it by J. P. Finan General Contractor, Inc., hereinafter referred to as "FINAN, INC." (Record 39).

On June 24, 1966, Weber, Inc., filed suit in the First Circuit Court of Hawaii against Finan, Inc., for the collection of the \$56,000.00 debt (Record 39). Finan, Inc., filed a counterclaim against Weber, Inc., alleging that the sum of \$61,084.61 was owed by Weber, Inc., to Finan, Inc. No details of the alleged counterclaim were set forth (Record 39 and Record 68). Accordingly, on July 27, 1966, the attorney for Weber, Inc., sought through pre-trial procedure to either dismiss the counterclaim for failure to set forth the basis thereof, or to obtain sufficient facts with respect to the alleged counterclaim. The Motion and Alternative Motion were denied by the Circuit Court. Thus at that point, absolutely no details with respect to the alleged counterclaim had been learned.

With its working capital tied up, Weber, Inc., found it necessary to file a Debtor's Petition on July 6, 1966, in the United States District Court for the State of Hawaii (Record 2 and Record 68).

On November 1, 1966, the Debtor's Petition was dismissed and Weber, Inc., was adjudged a bankrupt (Record 32). Pursuant to a Petition by the Trustee in Bankruptcy to intervene in the Circuit Court suit by Weber, Inc., against Finan, Inc., (Filed in the Bankruptcy Court on January 13, 1967) the Trustee and his attorney replaced the attorney for Weber, Inc. (Record 36). On January 16, 1967, the formal Order was entered by the Bankruptcy Court granting the Petition to Intervene and authorizing the Trustee and his attorney to carry on the proceedings to collect the \$56,000.00 from Finan, Inc., in the Circuit Court suit (Record 37-B).

No attempt was ever made by the Trustee or his attorney to continue

the pre-trial discovery proceedings in the Circuit Court suit, in order to determine whether the counterclaim was a sham (Record 66).

On March 21, 1967, the Trustee for Weber, Inc., filed a Petition for Leave to **C**ompromise the \$56,000.00 claim of Weber, Inc., against Finan, Inc., for the token sum of \$5,000.00. The basis of the Trustee's Petition to compromise the \$56,000.00 claim for \$5,000.00 was the request of the attorney for Finan, Inc., asking for the compromise (Record 41), and the statement contained in the Petition that the Referee and his counsel had held "a series of negotiations and conferences" and the "parties" had "agreed to compromise the above suit by the payment of \$5,000.00" (Record 39).

When it came to the attention of Appellant, Helen Weber, that the Trustee intended to compromise the \$56,000.00 claim, a Petition was filed with the Referee for the disallowance of the Trustee's requested compromise (Record 41-A).

On April 4, 1967, the Petition for Disallowance of the claim was filed in the Bankruptcy Court (Record 41-A). This Petition was based on the Affidavit of H. R. Weber attached thereto (Record 41-C and Record 41-D). This Affidavit showed, inter alia, that Finan, Inc., "has admitted that it owes the bankrupt \$24,154.00 on the subcontracts only (there being additional amounts owed on other items) and thus there was only a difference of \$4,963.34 in dispute with respect to the subcontracts" (Record 41-C and Record 41-D). At the time of the hearing the Referee in Bankruptcy stated that he proposed to accept the \$5,000.00 compromise offer. Since it was admitted by the Trustee's attorney that the \$5,000.00 figure had simply been "picked out of the air,"

and as there had been no further pre-trial discovery in order to require Finan, Inc., to disclose whether, in fact, the alleged counterclaim was simply a sham, and as the Trustee had not even examined the books and records of Finan, Inc., at the hearing, the attorney for the Appellant requested permission of the Referee in Bankruptcy to examine J. P. Finan, President of Finan, Inc., and his accountant Rex Clay, and others, to determine whether there was any basis or reason for accepting the compromise (Clerk's Minutes, Record 93). Thus, the burden was placed upon the Appellant, Helen Weber, by the Referee in Bankruptcy, to try and show whether there was a basis for the compromise.

J. P. Finan, President of Finan, Inc., was called by Appellant as a witness but he was unable to give any facts to support the counterclaim. The accountant, Rex Clay, was called by Appellant as a witness but he also was unable to give any information to support the counterclaim. Even the bookkeeper for Finan, Inc., was called by Appellant, and likewise he was unable to give any testimony to support the counterclaim. He testified it would be necessary for him to examine the records of Finan, Inc., before he would be able to give testimony in that connection (Clerk's Minutes, Record 92, and Tape Recording).

There being no evidence and thus no basis for accepting the \$5,000.00 offer (other than the statement in the Petition that it was based on "conferences" and the letter from Finan, Inc.'s attorney requesting the compromise), the Referee in Bankruptcy nevertheless held that he would accept the offer (Record 42 and Record 44). Thereupon the attorney for the Appellant asked that

an examination of the books of account of Finan, Inc., be made at Appellant's expense, by a person selected by the Referee (Record 69). This request was denied by the Referee in Bankruptcy (Record 43 and Record 44).

On April 28, 1967, a Petition for Review was filed in the United States District Court for Hawaii (Record 45).

This Petition alleged, inter alia, that there was no basis for acceptance of the compromise offer. Also that the compromise was an abuse of discretion as a matter of law (Record 46 and Record 47). The Petition for Review, although denied, was nevertheless left open in certain respects by the United States District Court for Hawaii (Tape Recording). A Petition for Rehearing (Record 65 and Record 69) came on before a substitute Judge and was denied (Record 72). This Appeal was then taken (Record 79).

QUESTION PRESENTED

Was the Order of the District Court of Hawaii, affirming the Referee's approval of the compromise of the bankrupt's claim against Finan, Inc., in the amount of \$56,201.61 for the token sum of \$5,000.00, error, as constituting an arbitrary action and thus an abuse of discretion.



SPECIFICATIONS OF ERROR

The District Court of Hawaii erred in affirming the Referee's approval of the \$5,000.00 compromise because:

(1) It was an abuse of discretion and constituted an arbitrary action as a matter of law.

(2) The basis of the compromise was the alleged counterclaim of Finan, Inc. Admittedly, neither the Trustee, his attorney, the Referee, or the Court, ever knew whether the counterclaim was a sham (even though such was evident from that pleading and the other facts). It was therefore error as a matter of law to accept the token sum of \$5,000.00 in settlement of the \$56,201.61 obligation owed by Finan, Inc.

(3) The burden was upon the Trustee to establish, by more than a scintilla of evidence, that there was a basis for the compromise of the alleged counterclaim of Finan, Inc.

(4) As a matter of law, the Order of April 20, 1967, approving the Trustee's Petition for Leave to Compromise the \$56,201.61 debt was an abuse of discretion (Record 43 and Record 44).

(5) "Negotiations and conferences" did not constitute proof of the alleged counterclaim.

(6) Until the books and records of account of Finan, Inc., were examined, all of the talk, conferences and negotiations in the world would not disclose whether Finan, Inc., had a counterclaim against Weber, Inc., and whether the amount thereof was \$6.00, \$6,000.00 or some other figure, which

fact, and the proof thereof, was contained, if at all, only in the books of account of Finan, Inc.

(7) Exhibit "A" attached to the Trustee's Petition for Leave to Compromise (Record 41) was, as a matter of law, insufficient to justify the acceptance of the sum of \$5,000.00 in compromise.

(8) The Appellant, Helen Weber, was required by the Referee and the District Court of Hawaii to assume the burden of proof (Record 62). However, even though Appellant was entirely willing to discharge such burden, and to, at her expense, have the records of Finan, Inc., examined, the Referee and the District Court refused to permit such examination. This was an arbitrary action and an abuse of discretion (Record 69, Record 92 and Record 75). The fountain from which any basis for the counterclaim of Finan, Inc., could ever emanate were the books and records of account of Finan, Inc.

SUMMARY OF THE ARGUMENT

The advisability of a compromise is determined by the District Court and the Referee in the exercise of a "sound judicial discretion."

A compromise will not be disturbed on Appeal unless the record reveals that the Court acted arbitrarily or not in the best interest of the bankrupt estate.

These propositions of law are well settled and govern this Appeal.

There is no dispute as to the essential facts upon this Appeal.

The Referee accepted a compromise of a \$56,201.61 debt due the bankrupt estate, for the sum of \$5,000.00.

The basis of the compromise was a counterclaim of \$61,084.61 by Finan, Inc., against the bankrupt. The Referee and the District Court never determined whether the counterclaim was a sham. Proof of that was contained in Finan, Inc.'s books of account. There was no examination of the books of Finan, Inc.

Acceptance of the token offer of \$5,000.00 was an arbitrary action, as a matter of law, until there was some evidence that Finan, Inc., had a counterclaim. Only the books of account of Finan, Inc., could show that fact.

The Referee acted blindly. Examination of the books of Finan, Inc., may in fact, positively confirm its \$56,201.61 debt to Weber, Inc.

This Court should remand this case with instructions to have the records of Finan, Inc., examined to determine whether the counterclaim is a sham, and for such further proper proceedings in connection therewith.

ARGUMENT

The Decision of the United States District Court for Hawaii was based upon the proceedings before the Referee in Bankruptcy (Clerk's Minutes, Record 92 and Record 63). Only argument was heard by the District Judge (supra, Record 92).

THE FIRST PART OF THE HISTORY OF THE

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IN THE YEAR 1625

BY JOHN BURNET

IN TWO VOLUMES

LONDON

PRINTED BY J. BARNARD

IN THE YEAR 1740

THE SECOND PART OF THE HISTORY OF THE

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THE THIRD PART OF THE HISTORY OF THE

REIGN OF CHARLES THE FIRST

IN THE YEAR 1625

BY JOHN BURNET

IN TWO VOLUMES

LONDON

Accordingly , the proceedings before the Referee in Bankruptcy must be examined to determine whether there was error.

The issue on this Appeal is whether the compromise offer made by Finan, Inc. , should have been accepted, in the exercise of a sound judicial discretion. The law involved in this Appeal is well settled.

Thus, as stated in 9 American Jurisprudence 2d, (Title, Bankruptcy) page 918, Section 1252:

"The approval of the court is a condition of the validity of a compromise. Ordinarily the wishes of the creditors prevail, but the court is, in the last analysis, responsible for the decision to be made.

"The advisability of a compromise is to be determined by the court exercising sound judicial discretion."

Accord: 8 B C.J.S. , Section 621(e) , pages 237 and 238.

And, numerous cases cited in footnotes.

Among the very important matters for a Court or a Referee to consider in accepting or rejecting a compromise, are the complexities of the litigation, the probabilities of success and the difficulties to be encountered.

Thus, as stated in 9 American Jurisprudence 2d (Title, Bankruptcy) page 918, Section 1253:

"Among the considerations addressed to the sound discretion of the court in acting upon a petition for the approval of a compromise settlement are the probability of success in the litigation, the difficulties which are likely to be encountered in the collection of a judgment if a judgment is obtained, the complexity of the litigation involved, the expense,



inconvenience, and delay attendant upon litigation, the paramount interest of the creditors, and the views which they express in reference to the advisability of a compromise."

Whether there will be any complexities is wholly unknown. Whether there is even any basis for the alleged counterclaim is wholly unknown. The advisability of accepting this compromise cannot be determined until it is known whether a basis for same actually exists.

THERE HAS BEEN NO EXERCISE OF JUDICIAL DISCRETION
IN THIS CASE

Neither the Referee or the Trustee ever purported to have examined the books of Finan, Inc. Until this has been done it is utterly impossible for anyone to know whether the compromise offer should be accepted.

Only the books of Finan, Inc., (nothing else) would show whether there was a basis for accepting less than the amount owed Weber, Inc., to-wit, \$56,201.61.

There could be absolutely no exercise of any judicial discretion until that examination had been made. At that time, the records of Finan, Inc., may confirm that the \$56,201.61 is owed Weber, Inc.

Until the books of Finan, Inc., had been examined, all that the Referee or the District Court could do was engage in pure rank speculation. They were acting blindly. Engaging in speculation is not the exercise of judicial discretion. It is an abuse of discretion.



There is no great undertaking in checking a firm's books, and the entries therein. It is a routine matter. If there are any charges against Weber, Inc., as alleged by Finan, Inc., then the records of Finan, Inc., will reveal that fact. If the records fail to show any charges against Weber, Inc., then this is evidence that none exist.

The books are the fountain or source which, after examination, and only then, will determine whether there is even any issue or dispute involved in this case.

ACCEPTANCE OF THE COMPROMISE WAS ERROR AS A
MATTER OF LAW

It is submitted that the Trustee's Petition for Leave to Compromise was totally insufficient, as a matter of law (Record 39 and Record 40). Because, the basis of the request in the Petition, was Exhibit "A". This Exhibit "A" was merely the request of the attorney for Finan, Inc., to try to obtain the compromise.

Exhibit "A" weakened Finan, Inc.'s claim that it even had any counterclaim.

Exhibit "A" was actually the red flag of warning to the Referee. In and of itself, it required and impelled the Referee to do more than accept the allegation of Finan, Inc., that it had a counterclaim. If Finan, Inc., had a \$61,084.61 counterclaim, it was unlikely that it would pay a bankrupt \$1.00, much less an additional \$5,000.00. Quite the contrary, it would be

requesting payment of money from the bankrupt.

Especially is this true when the Affidavit attached to the Petition for Disallowance of the compromise is analyzed. Because, the Affidavit of H. R. Weber, formerly general manager for Weber, Inc., stated that Finan, Inc., had even admitted owing \$24,154.00 (Record 41-E). Furthermore, the Affidavit stated that the balance of the \$56,000.00 obligation could be proved and "established (1) through the books, records and accounts of the Bankrupt; (2) through the books, records and accounts of J. P. FINAN GENERAL CONTRACTOR, INC.; (3) by subpoenaing the accountant for said J. P. FINAN GENERAL CONTRACTOR, INC. and his office records with respect to said subcontracts."

The allegations of this Affidavit were not disputed. Since the Trustee and the Referee had never examined the books of Finan, Inc., they could not know whether Finan, Inc., even had a counterclaim, much less whether the amount was \$1.00, \$5.00 or any other amount.

Furthermore, there were other circumstances to compel an examination before the compromise offer of Finan, Inc., was even considered, as follows:

(1) Finan, Inc., had never set forth any basis whatsoever for its alleged counterclaim;

(2) Finan, Inc., had resisted (successfully) all efforts to require it to reveal a basis for its alleged counterclaim (Record 68);

(3) The Affidavit of H. R. Weber, then before the Referee, specifically showed that Finan, Inc., "has admitted that it owes the bankrupt \$24,154.00 on the subcontracts only";



(4) Finally, since the Appellant had even offered to pay the cost of the examination of the books of Finan, Inc. (Affidavit of Helen Weber, Record 69), there was no basis or excuse for the Referee's arbitrary refusal to make an examination. No one could have been harmed by the examination (except that the records of Finan, Inc., could positively repudiate its alleged counterclaim). The circumstances demanded that an examination be made before the compromise offer was accepted.

Under these facts, acceptance of the compromise was a clear abuse of discretion.

If the Trustee had set forth in the Petition for Leave to Compromise, as his Exhibit "A", extracts or facsimile copies from Finan, Inc.'s books of account, a far different case would be before this Court. The Referee would then have had a basis upon which to exercise a reasonable discretion.

However, the mere claim, or allegation, by Finan, Inc., that it had a counterclaim in this case was not a proper basis for acceptance of a compromise regardless of the amount offered. An "allegation" is not "proof."

This Court has held that a "primary purpose" of a compromise, is to avoid the necessity of determining sharply contested issues.

California Assoc. Prod. Co. vs. Wil-Rud Corp. vs. Lynch, et al (9th CCA, 1950), 183 F2d 946, and cases cited page 949, Note 6.

Accord: Kaufman-Brown Potato Co. vs. Long (9th CCA, 1950), 182 F2d 594, 597.

See also: In Re Power Eng. Co. vs. Chatham Bank (7th CCA, 1949), 177 F2d 240.

In the case at bar the Referee, and the District Court were never in

a position to know whether any real dispute existed. They never progressed beyond the mere allegations of Finan, Inc., that it had a counterclaim.

Until some evidence or proof of the existence of a counterclaim was brought forth, the Referee could not know if a real controversy existed. Proof thereof was contained in Finan, Inc.'s books. No one ever saw the books. Examination may positively show that no controversy exists, because Finan, Inc.'s records may confirm its debt to Weber, Inc.

CONCLUSION

It is conceded that the Referee and the District Court have a very wide discretion. However, this Court will act where the record shows, as in this case, that the action of the Referee was arbitrary and not in the best interest of the bankrupt's estate.

There has not been any exercise of judicial discretion in this case. The Referee acted blindly. When the Referee accepted Finan, Inc.'s compromise offer he did not have sufficient proof to be able to exercise a judicial discretion. If Finan, Inc.'s books prove it owes Weber, Inc., \$56,201.61, the compromise offered by Finan, Inc., should not be accepted. Finan, Inc.'s records may positively prove that fact. There is not sufficient information to be able to make a proper judicial determination of that fact.

Under these facts, Appellant's request for an examination of the books of Finan, Inc., was a reasonable and proper request. It was essential in order for the Referee to be able to make and to exercise a proper judicial

decision.

Therefore it is respectfully requested that this Honorable Court remand this case with instructions for further proceedings herein, (1) to determine if there is any basis for the alleged counterclaim of Finan, Inc., in this case, or a sham, (2) subpoena or otherwise make an examination of the books of Finan, Inc., in order to determine whether a compromise of the \$56,201.61 debt should be accepted or rejected, and (3) such further proceedings as may be necessary and in the best interest of the bankrupt's estate.

8 B C.J.S. (Title, Bankruptcy), Section 622, pages 240 and 241, and many cases cited.

The foregoing is all that the Appellant requests in this case, simply a remand with these instructions.

DATED, Honolulu, Hawaii, this 14th day of October 1968.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. E. Parks", written over a horizontal line.


JOHN E. PARKS

Attorney for Helen Weber, Appellant



CERTIFICATE

I certify that, in connection with the preparation of this Appellant's Opening Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellant's Opening Brief is in full compliance with those rules.



JOHN E. PARKS

I also certify that I have delivered three copies of the within Appellant's Opening Brief to the office of Leslie T. Bennett, Attorney for J. P. Finan General Contractor, Inc., and three copies of the Appellant's Opening Brief to Hiroshi Sakai, Attorney for Ralph Aoki, Trustee in Bankruptcy.

